

DISCUSSION**I. Summary Judgment****A. Standard of Review**

Summary judgment is proper where the pleadings, discovery and affidavits show that there is ‘no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law.’ Fed. R. Civ. P. 56(c). A court will grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of the lawsuit under governing law, and a dispute about such a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Generally, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out “that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325. If the evidence in opposition to the motion is merely colorable, or is not significantly probative, summary judgment may be granted. See Liberty Lobby, 477 U.S. at 249-50.

The burden then shifts to the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Celotex Corp., 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make

1 this showing, “the moving party is entitled to judgment as a matter of law.” Id. at 323.

2 The court’s function on a summary judgment motion is not to make credibility
 3 determinations or weigh conflicting evidence with respect to a disputed material fact.
 4 See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th
 5 Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving
 6 party, and the inferences to be drawn from the facts must be viewed in a light most
 7 favorable to the nonmoving party. See id. at 631. It is not the task of the district court
 8 to scour the record in search of a genuine issue of triable fact. Keenan v. Allan, 91 F.3d
 9 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying with
 10 reasonable particularity the evidence that precludes summary judgment. Id. If the
 11 nonmoving party fails to do so, the district court may grant summary judgment in favor
 12 of the moving party. See id.; see, e.g., Carmen v. San Francisco Unified Sch. Dist., 237
 13 F.3d 1026, 1028-29 (9th Cir. 2001).

14 **B. Statement of Facts**

15 The following facts are not in dispute unless otherwise indicated. Plaintiff was
 16 housed at PBSP from 2005 to 2008. He suffered from hepatitis-C and non-insulin-
 17 dependent diabetes. (A. Shittu Decl. at 2.) Bree worked at PBSP as a registered nurse
 18 in 2005. Hartman is a registered dietician who was employed as a Food Administrator I
 19 at PBSP from 2003 to 2006. (Mot. at 2.)

20 According to Hartman’s declaration, in or about November 2004, changes were
 21 made to the outpatient medical diet program at PBSP. (J. Hartman Decl. at 1; Docket
 22 No. 95.) The major change in the program was the elimination of the 2400 and 3000
 23 calorie diets, the low-fat/low-salt diet, and the low-fiber diet. (Id.) Inmates who
 24 previously participated in the discontinued diets began to receive a standardized “Heart
 25 Healthy” diet that was also served to the general-population inmates. (Id.) The “Heart
 26 Healthy” diet was developed to meet inmates’ nutritional and caloric needs. (Id.)
 27 Diabetic inmates also received a nourishment-bag snack with their meal. (Id. at 2.)
 28 Insulin-dependent diabetics received a sandwich and a piece of fruit, and non-insulin

1 dependent diabetics received a piece of fruit in their nourishment bags. (Id.) Medical
2 staff were instructed to discuss these changes with their diabetic patients and teach them
3 how to select appropriate foods from their tray, *e.g.*, to choose peanut butter instead of
4 syrup with their pancakes. (Id.)

5 According to PBSP policy and procedure, only a physician or dentist can
6 prescribe a medical diet, including a diabetic nourishment bag and they do this by
7 completing a medical-diet Chrono. (Id.) The Chrono then is forwarded to the Health
8 Care Manager or designee for approval or disapproval. To implement the changes in
9 the diet program, Hartman instructed physicians and nurse practitioners to use a revised
10 medical diet Chrono to indicate which nourishment bag was required by each inmate.
11 (Id.) The revised Chrono was intended to replace the previous Chrono, that had
12 included among other things a space to prescribe the 3000 calorie diabetic diet that had
13 been eliminated. (Id.) Hartman provides copies of the new policy and the revised
14 Chrono that are consistent with her statement. (Id., Ex. A.)

15 According to Hartman, Plaintiff's doctors issued medical-diet Chronos that
16 authorized him to receive a non-insulin-dependent snack, *i.e.*, a piece of fruit, in March,
17 April and May 2005. (Id.; citing A. Shittu Decl., Ex. A at 22, 25, 29; Docket No. 96.)
18 Plaintiff alleges that one of these Chronos entitled him to receive peanut butter crackers
19 for a year but that he never received them. (Compl. at 12.) Plaintiff also claims that he
20 was prescribed the 3000 caloric diabetic diet by his doctor, and that when he did not
21 receive it, he complained to Bree and Hartman. (Id. at 13.) Plaintiff alleges that
22 Hartman informed him that the 3000 caloric diet only was given "when Doctors order
23 it," and that although she admitted that the standard diet "was not good for diabetics or
24 heart and kidney [patients]," she stated that she only had the power to recommend and
25 inform. (Id.) Hartman explains in her declaration that the doctors continued to use the
26 old medical-diet Chrono form instead of the revised Chrono, and marked the box next to
27 the discontinued 3000 calorie diabetic diet. (Id.) Hartman states that these Chronos
28 were issued shortly after the 3000 calorie diabetic diet had been replaced with the

1 Hearth Healthy diet, and that Plaintiff could not receive the non-existent “3000 calorie
2 diabetic” diet. However, Plaintiff did still receive approximately 3000-3200 calories
3 per day with the Heart Healthy diet and nourishment bag. (Hartman Decl. at 2.)

4 After Plaintiff had received the non-insulin-dependent snack for several months,
5 Hartman conducted a dietary consult with Plaintiff to address his complaints that he was
6 hungry at night. (*Id.*, citing Shittu Decl., Ex. A at 31.) As a dietician, Hartman only
7 could make recommendations to Plaintiff’s physician, who had the authority to
8 prescribe a medical diet. (Hartman Decl. at 2.) Hartman recommended that Plaintiff’s
9 physician issue a medical Chrono for the insulin-dependent snack, *i.e.*, a sandwich and
10 fruit, even though plaintiff was a non-insulin-dependent diabetic. (*Id.*, citing Shittu
11 Decl., Ex. A at 31.) It appears that thereafter, Plaintiff’s doctor agreed with the
12 recommendation and prescribed the insulin-dependent snack. (*Id.* at 32.) That
13 prescription remained in effect until August 29, 2005, when another doctor issued a new
14 Chrono changing Plaintiff back to the non-insulin-dependent snack. (*Id.* at 92.)
15 Hartman indicates that she was not consulted about the change. (Hartman Decl. at 3.)
16 However, Plaintiff alleges that Hartman called the dining hall and ordered that his snack
17 be cancelled because he had filed an appeal regarding his diet. (Compl. at 15.)

18 According to Plaintiff’s medical records, Bree saw Plaintiff on September 8,
19 2005, in response to Plaintiff’s complaints about his diet. (Shittu Decl., Ex. A at 98-
20 100.) Bree noted that Plaintiff appeared to be well at the time, and that he already was
21 scheduled for a follow-up visit in four days. (*Id.*) Plaintiff stated at the follow-up visit
22 that his blood sugar was high because in order to appease his hunger he was eating
23 foods he normally would avoid. (*Id.* at 108-109.) Bree informed Plaintiff that she
24 would find out why his evening snack had been discontinued and would contact the
25 dietitian regarding the reinstatement of his snack. (*Id.*) She also noted that Plaintiff
26 already was scheduled to see the doctor that week. (*Id.*) Bree saw Plaintiff again ten
27 days later, at which time she counseled Plaintiff about diabetic neuropathy and referred
28 him for an appointment with his doctor. (*Id.* at 122-23.) Bree noted that Plaintiff

1 previously had received the insulin-dependent snack but that his doctor had changed it
2 to the non-insulin-dependent snack. (Id.)

3 Hartman states that she tried to talk to Plaintiff about his diet and snack in
4 October 2005, but that he was not interested in talking about it. (Hartman Decl. at 3.)
5 Hartman also states that she had given Plaintiff guidelines for the management of his
6 diabetes several months earlier, and that she had spoken with him to address his
7 concerns about the amount of Vitamin K he needed as a hepatitis-C virus patient. (Id.)
8 She provided him with a list of foods served regularly as part of the Heart Healthy diet
9 that are good sources of Vitamin K, and explained that because Vitamin K is needed in
10 very small amounts, it was doubtful that he had a deficiency. (Id.) Hartman further
11 advised Plaintiff that he could purchase a multi-vitamin from the canteen if he doubted
12 that his nutritional needs were being met. (Id.)

13 Bree saw Plaintiff in December 2005. Plaintiff explained concerns that he was
14 not getting the appropriate diet, and Bree referred him for an appointment with a doctor.
15 (Shittu Decl., Ex. A at 143-44.)

16 **C. Legal Claims and Analysis**

17 Plaintiff alleges that Hartman and Bree were deliberately indifferent to his
18 serious medical needs, violating his rights under the Eighth Amendment. Deliberate
19 indifference to serious medical needs violates the Eighth Amendment's proscription
20 against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
21 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
22 WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc);
23 Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate
24 indifference" involves an examination of two elements: the seriousness of the prisoner's
25 medical need and the nature of the defendant's response to that need. See McGuckin,
26 974 F.2d at 1059.

27 A "serious" medical need exists if the failure to treat a prisoner's condition could
28 result in further significant injury or the "unnecessary and wanton infliction of pain."
McGuckin, 974 F.2d at 1059 (citing Estelle, 429 U.S. at 104). The existence of an

1 injury that a reasonable doctor or patient would find important and worthy of comment
2 or treatment; the presence of a medical condition that significantly affects an
3 individual's daily activities; or the existence of chronic and substantial pain are
4 examples of indications that a prisoner has a "serious" need for medical treatment. Id.
5 at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

6 A prison official is deliberately indifferent if she knows that a prisoner faces a
7 substantial risk of serious harm and disregards that risk by failing to take reasonable
8 steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison official
9 must not only "be aware of facts from which the inference could be drawn that a
10 substantial risk of serious harm exists," but also "must also draw the inference." Id. If
11 a prison official should have been aware of the risk, but was not, then the official has
12 not violated the Eighth Amendment, no matter how severe the risk. Gibson v. County
13 of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

14 In order for deliberate indifference to be established, there must be a purposeful
15 act or failure to act on the part of the defendant and resulting harm. See McGuckin, 974
16 F.2d at 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th
17 Cir. 1985). However, a finding that the defendant's activities resulted in "substantial"
18 harm to the prisoner is not necessary, nor is a finding that a defendant's actions are
19 egregious or that they resulted in significant injury to a prisoner, McGuckin, 974 F.2d at
20 1060, 1061 (citing Hudson v. McMillian, 503 U.S. 1, 7-10 (1992) (rejecting "significant
21 injury" requirement and noting that Constitution is violated "whether or not significant
22 injury is evident")), but the existence of serious harm tends to support an inmate's
23 deliberate indifference claims, Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
24 (citing McGuckin, 974 at 1060).

25 Hartman and Bree contend that they did not act with deliberate indifference to
26 Plaintiff's medical needs, as the medical records show that Plaintiff's diabetes was well-
27 controlled on the diet he received and that his stage of hepatitis-C did not require a
28 special diet. (Mot. at 6.) Essentially, Defendants argue that Plaintiff's alleged dietary

needs did not present a “serious medical need” warranting a special diet, or that the diet Plaintiff did receive created a substantial risk of serious harm. In support of their motion for summary judgment, they submit the declaration of Dr. Adekunle Shittu, the hepatitis-C and High Risk Patient doctor at Kern Valley State Prison who had held that position for approximately a year at the time of the declaration. (Shittu Decl. at 1.) Dr. Shittu has been licensed to practice medicine in California since January 2003 and is board certified in internal medicine. (*Id.*)

1. Non-insulin Dependent Diabetes

Based on his review of Plaintiff’s medical records from 2005 to the present, Dr. Shittu concludes that Plaintiff’s diabetes was well-controlled in 2005. (*Id.* at 2.) According to Dr. Shittu, an A1C test measures a patient’s average blood-glucose control for the previous two to three months and provides a picture of how well a patient’s diabetes treatment plan is working. (*Id.*) Dr. Shittu’s review of Plaintiff’s medical records showed that Plaintiff’s hemoglobin A1C measurements in 2005 all were below seven percent, which indicates good control. (*Id.*, Ex. A at 18, 37, 97, 120, 128, 139.) Dr. Shittu opines that Plaintiff received an appropriate diet for the management of his diabetes in 2005 and continues to receive an appropriate diet to date, *i.e.*, June 18, 2010. (Shittu Decl. at 2.)

It is undisputed that Plaintiff is a non-insulin-dependent diabetic. Although the Ninth Circuit has found that insulin-dependent Type 1 diabetes is a serious medical condition and that failure to provide proper food or insulin creates a serious risk of harm, Lolli v. County of Orange, 351 F.3d 410, 419-20 (9th Cir. 2003), no legal authority holds that this also is the case for non-insulin dependent diabetes.

Based on Dr. Shittu’s review of Plaintiff’s medical records, it cannot be said that Plaintiff’s diet was inappropriate for his diabetic condition. Hartman and Bree have offered undisputed evidence that they followed the revised medical-diet program at PBSP, which eliminated certain caloric diets and replaced them with a standardized Heart Healthy diet served to the general-population inmates. *See supra* at 4. Under the

1 revised program, Plaintiff was entitled to and did receive a nourishment-bag snack with
2 his meal. Plaintiff's fanciful contention is that he should have received the insulin-
3 dependent diabetes snack of a sandwich and a piece of fruit because the non-insulin
4 dependent diabetes snack of a piece of fruit was insufficient. (*Id.*) However, as noted
5 above, non-insulin dependent diabetes does not rise to the level of a serious medical
6 condition. *See supra* at 8.

7 Plaintiff also offers no evidence that Hartman acted with deliberate indifference,
8 as nothing in the record supports that Hartman knew of and disregarded a substantial
9 risk of serious harm to Plaintiff by failing to provide an adequate diet. *Farmer*, 511 U.S.
10 at 837. To the contrary, the medical records show that Hartman recommended that
11 Plaintiff's physician prescribe an insulin-dependent snack even though Plaintiff was a
12 non-insulin-dependent diabetic, and it is undisputed that as result Plaintiff received the
13 larger snack. *See supra* at 4.

14 It is true that this situation lasted only until August 29, 2005, when another
15 doctor issued a medical-diet Chrono changing Plaintiff back to the non-insulin-
16 dependent snack. (*Id.* at 92.) However, Hartman asserts that she was not consulted
17 about the change, (Hartman Decl. at 3), and Plaintiff's allegation that Hartman called
18 the dining hall and ordered that his snack be cancelled because he had filed an appeal
19 regarding his diet, (Compl. at 15), lacks foundation and in fact is contradicted by
20 Plaintiff's allegations in his complaint that it was Dr. Marino who indicated that
21 Plaintiff should receive the "non-insulin dependent" diet, (Shittu Decl., Ex. A at 92).
22 Moreover, in light of the fact that Plaintiff's blood-glucose levels were normal during
23 this period, Hartman had no reason to believe that Plaintiff's condition medically
24 warranted a different diet.

25 In his opposition brief, Plaintiff claims that there was an exception to the
26 medical-diet program, such that "if the patient['s] care provider ordered or
27 recommend[ed] [any of the eliminated] diets, the patient would [be able] to receive it."
28 (Oppo. at 3.) However, Plaintiff does not point to any evidence showing that such an

exception existed within PBSP medical-diet policies, nor does he offer a declaration from any of his doctors to support his allegations. Hartman and Bree submit the declaration of PBSP's then Chief Physician, Dr. Sayre, who states that there were no such exceptions to the medical-diet program. (M. Sayre Decl., at 2; Docket No. 111.)

2. Hepatitis-C Virus

Defendants' medical expert Dr. Shittu also would testify, if called to do so, that with respect to Plaintiff's status as a hepatitis-C virus patient, Plaintiff's medical records show that his liver was not de-compensated in 2005. (*Id.*) According to Dr. Shittu, an ALT test measures the levels of the ALT protein in blood and is used to monitor liver damage. Plaintiff's liver-function tests, specifically his ALT readings, were normal in 2005. (*Id.*, Ex. A at 65, 75, 83, 95, 105, 118, 157.) Dr. Shittu also states that a liver biopsy is a more specific indicator of liver de-compensation, and he notes that Plaintiff had a liver biopsy in 2004 that showed that his hepatitis-C virus was at Stage 2. (*Id.* at 21.) Only patients who are considered to have de-compensated cirrhosis, as indicated by Stage 4 or higher, require a special medical diet. (*Id.*)

Dr. Shittu concludes that a special diet was not a medical necessity for Plaintiff's stage of hepatitis, and that in his opinion Plaintiff received an appropriate diet for his stage of hepatitis-C infection in 2005. (*Id.*) Plaintiff argues that he should not have to wait until his liver becomes de-compensated to get a special medical diet, (Oppo. at 4), but he makes no attempt to refute the diagnosis that his hepatitis-C was at Stage 2. Under these circumstances, "[a] difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing more than a difference of medical opinion as to the need to pursue one course of treatment over another is insufficient, as a matter of law, to establish deliberate indifference, *see* Toguchi, 391 F.3d at 1058, 1059-60; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970).

Plaintiff also alleges that he developed anemia as a result of his diet. (Oppo. at

6.) However, he offers no evidence to support this allegation. Hartman states that she spoke with Plaintiff about his dietary needs as a hepatitis-C virus patient, and specifically discussed his concern about a Vitamin K deficiency. Hartman assured Plaintiff that he needed such a small amount that a deficiency was unlikely. See supra at 6. She also advised him that he could purchase a multi-vitamin from the canteen if he was still uncertain that his dietary needs were being met. Id. As discussed above, Plaintiff's difference of opinion as to that advice does not give rise to a § 1983 claim. Franklin, 662 F.2d at 1344.

3. Claims against Bree

Plaintiff has also failed to show that Bree acted with deliberate indifference to his medical needs. According to the medical records, Bree met with Plaintiff on various occasions to address his concerns about his diet. In each instance, Bree noted Plaintiff's concerns and made appropriate referrals to dieticians and physicians. Plaintiff alleges that Bree told him on one occasion that "if [she were to] give [peanut butter crackers] to [plaintiff], every inmate will want it," (Oppo. at 9), and Plaintiff appears to base his deliberate indifference claim on this single statement. However, as discussed above, Plaintiff has not shown that his medical condition required peanut butter crackers or other additional snacks, or that a failure to provide such snacks would result in substantial risk of serious harm. Farmer, 511 U.S. at 837. Plaintiff also points to no facts from which the inference of a substantial risk of serious harm could be drawn or that Bree in fact drew the inference yet failed to act. Id.


CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment, (Docket No. 94), is GRANTED.² All claims against them are DISMISSED with prejudice. Plaintiff's cross-motion for summary judgment, (Docket No. 107), is DENIED.

² Because the Court finds that no constitutional violation occurred, it is not necessary to reach Defendants' qualified immunity argument.

This order terminates Docket Nos. 94 and 107.

DATED: 3/30/11


JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FREDERICK W. SMITH,
Plaintiff,

Case Number: CV06-00103 JF

CERTIFICATE OF SERVICE

v.

LORI BREE, et al.,

Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/30/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Frederick Wayne Smith C-69967
Salinas Valley State Prison
PO Box 1040
Soledad, CA 93960

Dated: 3/30/11

Richard W. Wieking, Clerk